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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

ROSARIO PALERMO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the denial of Palermo's Motion for Severance violated Palermo's due process rights under the Fifth Amendment?

2. Whether mere customer's of a racketeering enterprise are criminally liable under the RICO Statute?

PARTIES BELOW

United States of America

Rosario Palermo

William H. Brown

John D. Fisher

Robert D. Young

Joseph Macaluso

Frank Scionti

Sam C. Martino

Paul Guarino

Jimmy Farina

Rolando Gonzalez Rodriguez

Joseph D. Lazzara

Joseph C. Rusello

Amalia Morgado

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PETITION FOR WRIT OF CERTIORARI
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Rosario Palermo petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals (App. A) is styled United States v. Martino, et al, and is reported at 648 F.2d 367.

JURISDICTION

The decision of the Court of Appeals was announced on June 19, 1981. No judgment has been entered based thereon, since the Court of Appeals has stayed its mandate pending the filing and disposition of this petition. Petitions for Rehearing and Rehearing En Banc were timely filed. By order dated September 17, 1981 the Court of Appeals denied these Petitions. (App. B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

United States Constitution, Amendment 5.

No person shall. . . be deprived of life, liberty, or property, without due process of law. . . .

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961ff.

1961. Definitions:

As used in this chapter --

(1) "Racketeering activity" means (A) any act or threat involving. . . arson. . . which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under. . . 18 U.S.C.. . . Section 1341 (relating to mail fraud). . .;

(4) "Enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "Pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity. . . .

1962. Prohibited Activities.

(C) It shall be unlawful for any person employed by or associated with any enterprise. . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . .

Federal Rules of Criminal Procedure.

Rule 8(b). Joinder of Defendants.

Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14. Relief from Prejudicial Joinder.

If it appears that a defendant. . . is prejudiced by a joinder of offenses or of defendants. . . for trial together, the court may. . . grant a severance of defendants or provide whatever other relief justice requires.

STATEMENT OF THE CASE

Petitioner, Rosario Palermo, was indicted by a grand jury in the Middle District of Florida, Tampa Division, in case number 77-00083-Cr-TH on June 8, 1977. The indictment charged 23 persons in 35 counts with violations of Title 18, § 1962(c), and § 1962(d), Title 18, § 1341 and § 1342 of the United States Code. Trial commenced on November 7, 1977, and continued until February 24, 1978. Twenty defendants were the subject of prosecution. Three of the indicted individuals, Willie Noriega, Joseph Carter, and Vic Rossi, waived trial, entered into plea bargains, and ultimately testified on behalf of the Government.

Approximately 200 witnesses whose testimony required approximately 13,000 pages of transcript were called by the Government in its case in chief. On December 14, 1977, the Government rested its case and each of the Defendants made Motions for Judgments of Acquittal pursuant to Rule 29, Federal Rules of Criminal Procedure. The Court denied Palermo's motion for judgment of acquittal and presentation of the defendants' cases began. It wasn't until February 24, 1978, after almost a month of deliberations, that the jury returned its verdicts. Sixteen of the defendants were found guilty of some or all of the counts with which they were charged.

Palermo was convicted on Counts I, II, III, and IV, and found not guilty on Count XXVII. On April 7, 1978, a Judgment and Commitment was entered by which Palermo was sentenced to 8 years' imprisonment on Count I, 8 years' imprisonment on Count II, five years' imprisonment on Count III, and 5 years' imprisonment on Count IV, all to run concurrently with each other. Each of the sentences of imprisonment was imposed pursuant to the provisions of Title 18, U.S.C. § 4205(d)(2).

Palermo, as well as each of the defendants, was charged in Count I with conspiracy to conduct and to participate directly and indirectly in the conduct of the affairs of an enterprise through a pattern of racketeering activity in violation of

§ 1962(d) of Title 18 of the United States Code. With the exception of Burton Chase, each defendant was also charged in Count II with unlawfully, knowingly, and willfully conducting and participating directly and indirectly in the conduct of the affiars of an enterprise through a pattern of racketeering activity in violation of § 1962(2), Title 18 U.S.C. In addition, Palermo was charged in Counts III, IV, and XXVII with devising and intending to devise a scheme or artifice to defraud and obtain money by means of false and fraudulent pretenses, representations, and promises from an insurance company through the use of the postal service of the United States in violation of § 1341 and § 1342 of Title 18, U.S.C.

Counts III and IV jointly charged Palermo, Joe Gomez, Paul Guarino, Frank Scionti, and Willie Noriega. These counts alleged the use of the United States Postal Service by Palermo to defraud the Jefferson Insurance Company by means of false and fraudulent pretenses, representations, and promises on a fire insurance policy issued on residential property located at 1811 Taliaferro Street, Tampa, Florida. The Indictment asserted that Palermo, Paul Guarino, and Joe Gomez each had a financial interest in the said property, and that on or about August 28, 1973, Palermo caused to be issued an insurance policy providing coverage on the premises against fire loss in the amount of $10,000. It was further alleged that on September 28, 1973, Paul Guarino, Frank Scionti, and Willie Noriega burned the property and on or about November 28, 1973, Palermo submitted a proof of loss to the insurance company indicating possible arson as the cause and origin of the fire. Finally, Counts III and IV assert that on or about January 25, 1974 a draft in the amount of $10,000 made payable to Palermo and Broadway National Bank, a lienholder on the property, was issued and mailed.

Count XXVII charged Palermo with mail fraud in connection with the burning of property located at 316 East Park Avenue, Tampa, Florida, which was owned by one John Ligori. Recitation

of the specific allegations is not necessary since a verdict of not guilty was rendered.

Finally, under the authority of Title 18, U.S.C., § 1963(a) and (c), the Indictment also contained a claim of forfeiture for the $10,000 received in insurance proceeds by Palermo as a result of the activities detailed in Counts III and IV dealing with the property at 1811 Taliaferro Street. In post verdict proceedings, the jury deliberated several hours but was unable to reach a verdict on Palermo. Accordingly, the trial court declared a mistrial. The jury returned a verdict of forfeiture against all other defendants.

In his appeal Palermo asserted, inter alia, (1) that it was impermissible to predicate a finding that he participated in the conduct of the affairs of Noriega's enterprises through a pattern of racketeering activity, upon his commission of a single fraudulent act, merely because three separate charges of mail fraud flowed from that act; and (2) that it was improper to charge a large number of persons, each of whom was alleged to have engaged in similar but factually unconnected conduct, the only common thread being that each of them dealt separately, and on different occasions, with the same arsonist. The Court of Appeals affirmed.

A writ of certiorari should be granted by this Court to review the decision in United States v. Martino, 648 F.2d 367 (5th Cir. 1981). Each of the questions presented through this petition addresses an important Federal question which should be decided by this Court. In addition, each question has been answered by the Fifth Circuit in a manner which conflicts with the decision of this Court or the decision of another Circuit Court of Appeal. The first question demonstrates the violation of due process of law by the RICO-mass trial concept of prosecution. The second question addresses the interpretation and construction of the Federal RICO Statute.

ARGUMENT

I

THE TRIAL COURT'S DENIAL OF PALERMO'S MOTIONS FOR SEVERANCE RESULTED IN A MASS TRIAL THAT VIOLATED PALERMO'S FIFTH AMENDMENT DUE PROCESS RIGHTS.

To facilitate prosecutional convenience and economics, the Court of Appels allowed Palermo and the other defendants to be victimized by the mass application of the RICO Statute. The traditional justification for mass trials -- saving time by eliminating repetition of the same evidence -- has no application in a case such as this. As declared in United States v. Echeles, 352 F.2d 892, 896 (7th Cir. 1965): "A single joint trial, however desirable from the point of view of efficient and expeditious criminal adjudication, may not be had at the expense of a defendant's right to a fundamentally fair trial." With a few minor exceptions, the evidence presented here could have been repeated in separate trials that would have been completed in much less time than the three months necessitated by the joint trial.

The Court of Appeals was keenly aware of the substantial risks of manifest unfairness of joint trials, yet failed to reverse and order manageable trials of these defendants. United States v. Martino, 648 F.2d 367, 385-386 (5th Cir. 1981). The court relied on the skill of the presiding judge and the verdicts returned by the jury to support the conclusion that a joint trial was proper. Palermo agrees with the Lower Court that the Trial Judge conducted the trial "with great skill and with a judicial professionalism much to be desired." Martino, at 388. However, Palermo strongly contends that the case was too great for one judge, no matter how skilled, or one trial. The facts of the case demand separate trials to avoid the spill-over and transference of guilt that was so pervasive and incapable of being controlled by instructions from the Trial Judge to lay jurors incapable of sitting through the large quantity of evidence.

Judicial attempts to assist the jurors, no matter how skillfully presented, cannot circumvent the inherent prejudice of mass

prosectuions. As recognized in United States v. Bufalino, 285 F.2d 408, 417 (2nd Cir. 1960):

> Courts have long been indulged in the somewhat naive supposition that jurors can properly assess such evidence and determine from it the individual guilt of many defendants, even when aided by a careful summary of the evidence as [the trial judge] gave here.

The sheer bulk of a case of this magnitude prevented the jurors, no matter how diligent or conscientious, from fairly separating and considering the charges against each individual defendant. Simply because the verdicts indicate that the jurors found some of the defendants innocent does not mean that the jury properly analyzed the evidence. As realized in United States v. Central Supply Association, 6 F.R.D 526, 533 (N.D. Ohio 1947):

> To believe that an ordinary jury could hold in mind the names and identities of all the defendants and segregate and classify all the different bits of evidence, requires a faith and confidence in the human intellect which experience does not support. Faith that the verdict in such a case could be rational and fair, would have to be based on a blind trust in ritual contrary to all experience of possibilities.

The jury verdicts in the case support Palermo's contention that the jury was confused by the mass of evidence presented to it. In spite of the Lower Court's conclusion that the jury "meticulously sifted the evidence," the "inconsistent verdicts" between the jury's conclusions and the Lower Court's reversals (the jury returned five guilty verdicts, one for Chase and four for Lostrocco, which the Lower Court found erroneous as a matter of law) affirm the type of juror confusion surrounding Palermo's severance claims. In a case as close on the facts as Palermo's, such confusion prejudiced Palermo to the degree necessary to sustain his abuse of discretion argument.

The Lower Court stated that it does not encourage mass trials and that the defendants came close to meeting their severance burden in this case. Martino, supra, at 386. It is respectfully submitted that if severance is not required on these facts, it never will be required. Stating that mass trials are not encouraged is meaningless rhetoric unless this Court is willing to act

in a case as extreme as this. So long as skilled prosecutors in complex cases have the foresight to include "throw away" defendants in their indictments, marginal defendants will find no meaningful protection under Rule 14 of the Federal Rules of Criminal Procedure. It is time to draw the line and this case is certainly an appropriate place to do so under Kotteakos v. United States, 328 U.S. 750 (1946). The RICO Statute does not authorize that individuals "be tried en masse for the conglomeration of distinct and separate offenses committed by others." Kotteakos v. United States, supra.

Kotteakos remains this Court's definitive statement of the principles by which to determine whether verdicts reached in a mass trial may be upheld. In Kotteakos, this Court stated:

> Numbers are vitally important in trial, especially in criminal matters. Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application.

To the extent there are differences between this case and Kotteakos, they weigh more heavily against tolerating the determination of mass guilt authorized below. This trial was longer, the evidence more complex, and the defendants more numerous. To decide otherwise would be to assert that the enactment of RICO overruled this Court's decision in Kotteakos, an assertion that shows some signs of acceptance in lower court opinions. See, e.g., United States v. Elliot, 571 F.2d 880 (5th Cir. 1978).

It has become de rigeur for appellate opinions in cases such as this to proclaim our commitment to individual determinations of guilt or innocence, and ritually condemn mass trials, but in the end to acquiesce in their conduct. It is time to cease condemning mass trials and to commence forbidding them. The sheer length and complexity of this proceeding and the number of factually unrelated defendants and transactions jammed into one case in one court provides an opportunity for this Court to accept jurisidction to correct the Lower Court's error.

II

MERE CUSTOMERS OF A RACKETEERING ENTERPRISE ARE NOT CRIMINALLY LIABLE UNDER 18 U.S.C. § 1962.

Palermo was charged with violating 18 U.S.C. § 1962, commonly referred to as RICO. The RICO Statute, 18 U.S.C. § 1962(c), states:

> "It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . ." (Emphasis added.)

The term "enterprise" is defined as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact, although not a legal entity." See U.S.C. § 1961 (1). Recently, this Court in United States v. Turkette, _____ U.S. _____, 69 L.Ed.2d 254 (1981) delineated the proof requirements of sustaining a conviction under RICO, stating:

> "The government must prove both the existence of an "enterprise", and the "connected pattern of racketeering activity." The enterprise is an entity; for present purposes a group of persons associated together for a common purpose of engaging together in a course of conduct. The pattern of racketeering activity, is, on the other hand, a series of criminal acts as defined by statute. See 18 U.S.C. § 1961(1). The former is provided by evidence of an ongoing organization, and by evidence that various associates function as a continuing unit. The latter is proven by evidence of a requisite number of acts of racketeering committed by the participants of the enterprise. While the proof used to establish these separate elements may in particular cases coalese, proof of one does not necessarily establish the other." (Emphasis added.)

Accordingly, to establish an enterprise under Turkette, the government has the burden of proving that peripheral associates, such as Palermo, had a common purpose of associating together in order to engage in a certain course of conduct. Therefore, while the core conspirators banded together in order to profit from any and all acts of racketeering, the "dissatisfied owners" had no such intention. If anything, Palermo and the other peripheral

defendants had the extremely narrow purpose of only profiting from the arson on their property.

In Turkette, supra, this Court recognized that a RICO "enterprise" requires additional culpability which is evidenced by an "ongoing organization where the various associates function as a continuing unit." The definition of a continuing unit must be read narrowly, otherwise all customers by virtue of their status (as customers) are automatically included as part of a larger enterprise. Such a result would be inconsistent with the decision in United States v. Varelli, 407 F.2d 735 (7th Cir. 1969) where the court held that the relation of a purchaser with a seller, absent any prior agreement beyond the mere sales agreement, does not prove a conspiracy for the purchaser to be employed by or associated with the enterprise. This question of what conduct or participation by the individual defendant is required to come within the meaning of the statute has created conflict between Circuit Court decisions.

In United States v. Martino, 648 F.2d 367 (5th Cir. 1981), the Fifth Circuit stated:

> "Congress decreed that by committing two of the designated predicate crimes relating to the affairs of the "enterprise", a person participates in the enterprise and thus violates RICO. . .18 U.S.C. § 1962 does contemplate the prosecution of those "customers" who engage in a pattern of racketeering activity in furtherance of the affairs of the enterprise. By definition such a person becomes more than a customer of the enterprise.

This interpretation of RICO is clearly erroneous. Under it, any one is culpable who commits a series of criminal acts as defined by statute, regardless of whether the individual defendant along with other associates functioned as a continuing unit. It is difficult to believe the Fifth Circuit intended such a broad interpretation, especially in light of the mandatory forfeiture penalties for a Section 1962 violation. See 18 U.S.C. § 1963(2). Instead, RICO seeks to punish those persons employed by, or associated with any enterprise engaged in interstate commerce, "who conduct or participate in the conduct of such

enterprise's affairs through a pattern of racketeering activity. . ." See 18 U.S.C. § 1962.

To conduct or participate in the conduct of the enterprise's affairs, a person must participate in the management, control, or operation of the enterprise. See United States v. Diecidue, 603 F.2d 535, 546 (5th Cir. 1979) (simply purchasing cocaine did not constitute an agreement with the enterprise). As a customer, Palermo had no such power to direct or manage the enterprise's affairs. Any relationship he had with this enterprise was tenous at best, since the association existed for only one building.

In seeking to define the language, "conduct or participate in the conduct of such enterprise's affairs," the Fifth Circuit relied heavily on United States v. Tucker, 638 F.2d 1292 (5th Cir. 1981). This reliance was misplaced, however, since Tucker and Martino, supra, are easily distinguished. In Tucker, supra, the Fifth Circuit held that a waitress employed by a gambling enterprise performed functions necessary to, or helpful in, the operation of the business and could be included to meet the 5-person requirement of the statute. In the instant case, however, Palermo was not employed by the enterprise, he was merely a customer; hence, Tucker did not decide the question whether a customer could be culpable under Section 1955, as conducting a gambling business. However, dicta in both Tucker and United States v. Avarello, 592 F.2d 1339 (5th Cir. 1979), indicates that while an employee of the enteprise can be culpable if the activities performed were necessary or "helpful" to the operation, a non-employee is culpable only after performing "necessary functions to the operations of the business."

In the United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979), the Fourth Circuit interpreted the statutory language "conduct or participate" to require "some involvement in the operation or management of an enterprise." Thus, the Mandel rationale would only reach those various defendants that have functioned as a continuing unit. This is consistent with this Court's reasoning in Turkette, supra. Clearly, those various as-

sociates that function as a continuing unit with a common purpose come within the meaning of the statute. On the other hand, mere customers of the enterprise's service do not meet the statutory requirements of culpability and, therefore, should not be subject to the provisions of the RICO statute.

In Turkette, this Court set forth the requirement that the enterprise be conceptually distinct from the illicit activities in which it engages, a distinction preserved by requiring that a defendant's membership in or association with an enterprise be shown by evidence that he and his alleged associates in fact functioned together as a continuing unit integral to an ongoing organization. However, the implications of this requirement necessarily conflict with the decision below, for the Court of Appeals authorized the conviction of anyone who had any culpable contact with the enterprise, no matter how limited in time, place or circumstance. Nor do the conflicting opinions of the Circuit Courts resolve this inconsistency.

This case is uniquely situated for resolving these unanswered questions regarding the applicability and interpretation of the RICO Statute because of the particular factual relationships between the several defendants and the enterprise. This Court must address these questions to draw the line and limit the ever-broadening scope of the RICO Statute.

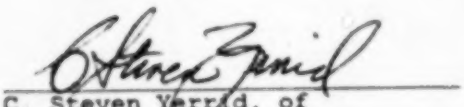
ADOPTION OF CO-PETITIONER'S ARGUMENTS

Co-petitioners set forth in the list of parties are and will be filing various additional arguments to support this Court's review of Martino, supra. Pursuant to the provisions of Rule 19.3 of the Supreme Court Rules, the petitioner, Rosario Palermo specifically adopts those issues and arguments that benefit thisPetitioner.

CONCLUSION

Based upon the foregoing arguments and authorities, Palermo respectfully requests an order granting the Petition for Writ of Certiorari so that this Court may answer the important questions set out above and eliminate the conflict in decisions.

Respectfully submitted,



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